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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OCA FILE

April 13, 1989

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer -

Office of National Drug Control Policy
Office of Personnel Management
Department of Agriculture
Department of Commerce
Department of Defense
Department of Education
Department of Energy
Department of Health and Human Services
Department of Housing and Urban Development
Department of the Interior
Department of Labor
Department of State
Department of Transportation
Department of the Treasury
Department of Veterans Affairs
Central Intelligence Agency
Environmental Protection Agency
General Services Administration
National Aeronautics and Space Administration
Small Business Administration

SUBJECT: Justice Department report on H.R. 763, "Restrictions Relating to Drug Testing by Federal Agencies."

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than Wednesday, May 3, 1989.

Questions should be referred to Hilda Schreiber (395-7362), the legislative analyst in this office.

Naomi R Sweeney

Naomi R. Sweeney for
Assistant Director for
Legislative Reference

Enclosures

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

APR 0 6 1989

Honorable Richard G. Darman:
Director, Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Darman:

Enclosed are copies of a proposed communication to be transmitted to the Congress relative to: H.R. 763, "Restrictions Relating to Drug Testing by Federal Agencies."

Please advise this office as to the relationship of the proposed communication to the Program of the President.

Sincerely,

Thomas M. Boyd
Assistant Attorney General

Enclosures

TO COORDINATE CLEARANCE CONTACT M. FAITH BURTON, OLA. 633-5310.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable William D. Ford
Chairman, Committee On Post
Office and Civil Service
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This responds to your request, dated February 22, 1989, for this Department's position on H.R. 763, "Restrictions Relating to Drug Testing by Federal Agencies." We appreciate the opportunity to review this bill and comment on its possible impact particularly concerning litigation against the United States.

A number of aspects of this bill are very troubling. First, the bill would prohibit almost all forms of drug testing of both civilian and military personnel. As you know, the Supreme Court very recently addressed the issue of federal government drug testing and upheld as constitutional a Federal Railway Act regulation authorizing mandatory drug testing without suspicion of drug use for certain railway employees following major train accidents as well as a U.S. Customs Service policy of testing applicants for certain sensitive positions. Skinner v. Railway Labor Executives' Ass'n, No. 87-1555 (U.S. March 21, 1989); National Treasury Employees Union v. Von Raab, No. 86-1879 (U.S. March 21, 1989). We believe H.R. 763 should be carefully re-examined in light of these decisions since under the bill, federal agencies would be forbidden to test employees involved in on-the-job accidents. Additionally, under the bill, agencies would be prohibited from testing applicants for any kind of position within the government regardless of the crucial nature of the duties involved. Agencies would also be prohibited from testing employees in sensitive public safety, law enforcement or national security positions on a random basis to assure that they are drug-free. Agencies could not test employees as a follow-up to counselling for drug abuse and addiction thereby impeding the success of programs designed to rehabilitate employees with drug problems.

As you know, on September 15, 1986, President Reagan issued Executive Order 12564, entitled "Drug-Free Federal Workplace," 51 Fed. Reg. 32,889 (1986), which established a uniform policy that all federal employees are required to refrain from the use of

illegal drugs and which directed each agency to develop a drug-free workplace plan which would include random testing for sensitive positions, reasonable suspicion, post-accident, follow-up, and applicant testing. H.R. 763 would not only serve to nullify the drug testing plans issued or scheduled to be issued pursuant to this Executive Order but would also eliminate a number of testing programs throughout the government, some of which have been ongoing for several years, including the programs upheld by the recent Supreme Court decisions. For example, H.R. 763 would eliminate the Defense Department program which has conducted over 40,000 tests in the past five years. The bill would not only eliminate this ongoing testing of military personnel but also ongoing testing programs for such employees as Secret Service personnel who protect the President, air traffic controllers, and civilian guards at military weapons installations. In sum, the federal government would be deprived of an effective tool for maintaining drug-free workplaces which has been upheld by the Supreme Court and which is used extensively by private employers.

Second, the bill prohibits all drug testing of both civilian and military personnel, except when supervisors determine that an employee's performance is impaired and when "there is reason to believe that the impairment is due, in whole or in part, to the employee's then being under the influence of a controlled substance." § 7352(b)(2)(A)(ii). Although this type of testing, often called "reasonable suspicion" testing, is useful in detecting and deterring drug use in some circumstances, reasonable suspicion testing alone often is not effective in detecting and deterring drug use among employees. For example, some types of federal employees frequently or even regularly perform their duties away from supervisory observation. Furthermore, reasonable suspicion testing alone simply would be ineffective because the impairment caused by illegal drug use often cannot be observed, even by the highly trained, and, thus, would go undetected.

Additionally, the very restrictive form of reasonable suspicion testing permitted by the bill would prove even more ineffective for detecting and deterring drug use. Under H.R. 763, supervisors would have to wait to conduct a reasonable suspicion drug test until the employee's performance on the job is impaired. Thus, under the language of this bill, even if a supervisor saw an employee taking illegal drugs on the job or had good reason to believe that the employee was under the influence of drugs, reasonable suspicion testing would be prohibited until the employee's job performance was impaired. For many federal employees in highly sensitive and responsible positions, such a delay in testing could significantly jeopardize public safety, the safety of other employees, national security or other vital duties. Furthermore, the bill's emphasis on on-the-job impairment ignores legitimate interests of the federal government

in assuring that its employees do not use illegal drugs on or off the job. For example, federal drug law enforcement efforts could be seriously compromised by law enforcement personnel who use illegal drugs either on or off the job.

Third, the bill would authorize the Office of Personnel Management to establish technical guidelines for the acquisition, handling, and analysis of drug test samples. As you know, specific technical provisions for many of the current federal urinalysis testing programs have been set out in the "Mandatory Guidelines for Federal Workplace Drug Testing Programs," 53 Fed. Reg. 11,970 (April 11, 1988), issued by the Department of Health and Human Services ("HHS") pursuant to Executive Order 12564. These guidelines are the result of several years of very careful and thorough consideration by an agency that clearly has the necessary medical and technical expertise. The guidelines serve to safeguard individual privacy, protect against accidental or intentional contamination of the urine sample, establish a careful chain of custody procedure to avoid sample mix-ups, and set rigid laboratory standards and quality control to assure the accuracy of test results. Moreover, the Supreme Court in its recent decisions in Skinner and Von Raab expressly considered and upheld the HHS Guidelines as significantly minimizing drug testing programs' intrusion on privacy interests. To vest responsibility in the Office of Personnel Management to create new guidelines would not only result in unnecessary, duplicative efforts but would essentially transfer responsibility to an agency with less relevant expertise. Thus, for example, the bill fails to recognize that matters such as the "methodology and procedures to be used in the evaluation of any such samples" and "the respective minimum levels of reliability required for initial and confirmatory drug tests" have already been carefully and thoroughly developed. § 7352(c)(1)(B),(C). Furthermore, the bill's failure to define "initial" and "confirmatory" tests render the provisions concerning the actions which can and cannot be taken after either test very unclear.

Fourth, the bill provides that even the limited form of reasonable suspicion testing is permissible only if management negotiates the testing plan with federal employee unions and reaches an agreement with the unions. Since such matters generally have been held by the Federal Labor Relations Authority to be the non-negotiable exercise of management's right to determine its internal security practices, the bill would undermine fundamental principles of federal labor-management relations established by the Civil Service Reform Act of 1978.

Finally, the section of the bill that creates a new civil remedy against the United States for equitable and monetary relief is particularly troublesome. This provision would also serve to derogate the exclusive statutory scheme for resolving federal employment disputes in the Civil Service Reform Act as

well as the comprehensive scheme for addressing tort claims against the United States in the Federal Tort Claims Act. Both of these Acts are reasonable channels for claims arising from the entire spectrum of governmental activities and have effectively withstood the test of time. The piecemeal approach which this provision of the bill would enact is arbitrary and undermines both the procedural and substantive provisions of these Acts. We are not only concerned about increased litigation against the United States but also about the adverse precedent this provision would create for future legislation regarding federal employment matters and tort claims against the United States.

The Office of Management and Budget has advised this Department that there is no objection to the presentation of this report from the standpoint of the Administration's programs.

Sincerely,

Thomas M. Boyd
Assistant Attorney General